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IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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CENTRAL EXCISE APPEAL No.81 of 2007
DATE OF DECISION: 12.10.2007

Commissioner of Central Excise Commissionerate, Rohtak

... Appellant

Versus

M/s. Indo Dane Textile Industries, Kabri Road, Panipat.

... Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present:- Mr. Sanjeev Kaushik, Advocate for the appellant.

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M. M. KUMAR, J.

The Commissioner of Central Excise , Rohtak has filed the instant appeal under Section 35-G of the Central Excise Act, 1944 (for brevity, the Act) challenging the order dated 9.2.2007(Annexure A3) passed by the Customs Excise & Service Tax Appellate Tribunal, New Delhi (for brevity, the Tribunal). It has been claimed that following substantial question of law arises for determination of this Court:-

> " Whether, Refund of Cenvat Credit paid on inputs (AED T&T) used in the manufacture of final products exported under rebate claim under Rule 18 of Central Excise Rules, 2002 on payment of duty, is allowed under Rule 5 of Cenvat Credit Rules, 2002?"

Brief facts of the case may first be noticed. The assessee-respondent (hereinafter-'Assessee')is engaged in the manufacture of textile goods like made-ups and home furnishing articles. The assessee is duly registered with Central Excise Division, Panipat and had filed refund claim amounting to Rs.9776/- under Rule 5 of Cenvat Credit Rules, 2002 (for brevity, CC Rules 2002) in respect of unutilized Cenvat Credit of additional

excise duty (Textile and Textile Articles) paid on the inputs. The assessee had exported finished goods on payment of Basic Excise Duty under rebate claim covered by Rule 18 of Central Excise Rules, 2002 (for brevity, Excise Rules 2002). As no Additional Excise Duty (T&T) was chargeable on the finished goods therefore, the Cenvat Credit of Additional Excise Duty (T&T) paid by the assessee on inputs remained unutilized. The rebate claim made by the assessee under the Excise Rule 2002 was granted to them. Thereafter, the assessee filed refund claim of Additional Excise Duty (T&T) paid on inputs under Rule 5 of the CC Rules, 2002.

The Assistant Commissioner, Central Excise, rejected the claim by passing the order-in-original dated 2.3.2006, (Annexure A-1), mainly on two grounds; (a) that the refund claim made under Rule 5 of CC Rules, 2002 was not maintainable as the export was made on payment of duty whereas Rule 5 of the CC Rules envisages for refund of Cenvat Credit in case the export was made under Bond and (b) that the respondent did not provide the details of inputs consumed in the export goods nor it followed the conditions of notification dated 1.3.2002 issued under Rule 5 of CC Rules, 2002.

The assessee challenged the order-in-original before the Commissioner of Appeals, who allowed the appeal by setting aside the order dated 2.3.2006. Accordingly, the refund claim of the assessee was allowed. The basic premise for allowing the refund claim is that the use of the inputs was adequately proved. The finding of the adjudicating authority to that extent being erroneous was set aside. It was further held that the adjudicating authority has travelled beyond the scope of the show cause notice as there was no allegation that the refund under Rule 5 of the CC Rules 2002 was not admissible on the ground that the assessee exported the goods by paying the excise duty as against the requirement of the Rule of exporting goods under a Bond.

On a further appeal filed by the Revenue, the Tribunal upheld the order of the Commissioner. According to the Tribunal, the basic requirement for refund under Rule 5 is that the inputs should be used in the final or intermediate products which should be cleared for export as per the rule. The Cenvat Credit in respect of such inputs which are used is allowed

to be utilized by the manufacturer towards the payment of excise duty on any final product cleared for home consumption or for export on payment of duty. If the manufacturer has availed of draw backs or claimed the rebate of duty under CC Rules 2002, then the manufacturer becomes dis-entitled for refund of modvat credit as per proviso to rule 5. In the present case, the exports were admittedly made on payment of duty. However, the Revenue has claimed that as exports were made under the rebate claims, the assessee was not entitled to any refund under Rule 5 of the CC Rules 2002. The Tribunal clarified that the provisions of the Act were to apply to CC Rules 2002 and the Additional Duty of Excise (Textiles Articles) Act 1978. The word 'duty' in rule 5 of CC Rules 2002 would necessarily mean the duty payable under Section 3 of the Act. The additional excise duty in respect of textiles and textile articles is levied under the provisions of Section 3 of Additional Duty & Excise (Textiles and Textile Articles) Act, 1978 (for brevity, 1978 Act). Under sub-section (3) of Section 3 of 1978 Act, it is provided that the provisions of the Act and the 'Rules' framed thereunder including those relating to refunds and exemptions from duties would apply to the levy and collection of duties of excise leviable under that Section in respect of any goods. In other words definition clause of Excise Rules of 2002 and other provisions including rules 18 and 19 which have arisen for consideration would apply even in respect of additional duties imposable under 1978 Act.

The Tribunal further concluded that in the instant case no export was made without payment of excise duty and, therefore, Rule 19 of the Central Excise Rules, 2002 was not applicable nor Rule 18 was attracted. The view of the Tribunal is discernible from para 8 of the order which reads as under:-

> "8. Under rule 18 of the Central Excise Rules, 2002, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations as may be specified. While rule 18 applies to grant of rebates of duty by virtue of notification issued thereunder, rule 19 relates to export

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without payment of duty subject to the safeguard conditions, as may be specified by notification issued by the Board. It is by virtue of the requirement in the notification issued under sub-rule (3) of rule 19 that the question of bond or letter of undertaking could arise. Such Notification 42/2001-CE dated 26.6.2001, was issued by the Central Board of Excise and Customs under sub-rule (3) of rule 19, which provided export under bond of the goods which were exported from the factory without payment of duty. The exporter was required to furnish a general bond in the form specified without payment of excise duty. In the present case, admittedly, there were no exports without payment of excise and, therefore, rule 19 had no applicability. Thus, no question had arisen of execution of bond as required by the said notification issued under rule 19(3) by these respondents. They admittedly exported the goods by payment of excise duty which was done by adjusting the basic excise duty which was payable under the Central Excise Act, 1944, for which the rebate claim was made under rule 18. Rebate is granted "of duty paid" on the excisable goods, as contemplated by rule 18. No additional excise duty was payable on the final products and therefore, rebate could have been claimed only in respect of the duty paid which was the specific excise duty relatable to rule 18 read with Section 3 of the Central Excise Act, 1944. No application for rebate of additional excise duty which was paid on the inputs, was made under rule 18 read with Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act. Therefore, an application for refund of such additional excise duty by way of cenvat credit in the account of the respondents could be made under rule 5 of the Cenvat Credit Rules by these respondents. They were not debarred under the proviso to rule 5 of the Cenvat Credit Rules, because they had not claimed rebate of the additional excise duty under rule 18, since no such claim could have been made because no additional excise duty was payable

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> in respect of the final product. Moreover, they also did not apply for rebate of the additional excise duty which was paid in respect of the inputs and for which modvat credit was taken. Therefore, an application under rule 5 for refund of such cenvat credit was not hit by the proviso to rule 5 in the case of the respondents. ---- ----- In any event, there was no allegation in the show cause notice against the respondents as regards their having exported without bond and hence the Commissioner (Appeals) was justified in not entertaining that ground canvassed by the Revenue." (emphasis added)

On the basis of the aforementioned finding, the Tribunal concluded that the inputs were utilized in the final products which were exported on payment of duty. Therefore, it did not debar the respondents from claiming refund of additional excise duty under Rule 5 of the CC Rules 2002 because the Cenvat Credit relating to the duty under Rule 5 could not be adjusted at any stage. The Tribunal also concluded that in any event there was no allegation in the show cause notice against the respondent in respect of exports without Bond and, therefore, the Commissioner (Appeals) was found to be justified in rejecting that ground canvassed by the Revenue.

We have heard the learned counsel at a considerable length and are unable to find any legal infirmity in the view taken by the Commissioner (Appeals) or the Tribunal. The Tribunal has dealt in detail as to how the refund claim made by the assessee was available within the four corners of rule 5 of the CC Rules 2002. It has rightly held that the question of execution of Bond while making export was not raised by the Revenue at any stage and, therefore, that ground was not available as the assessee was not granted opportunity to meet such a plea. Moreover, on merit also it has been found as a fact that the assessee exported the goods by payment of excise duty under the Act for which rebate claim was made under Rule 18 and rebate is granted 'of duty paid' on the excisable goods contemplated by Rule 18 of CC Rules 2002. The expression 'duty' as defined in the Act and the Excise Rules of 2002 would apply to the provisions of Section 3 of 1978

Act, as has already been discussed in the preceding paras. It is on account of statutory definition. The situation would be the same with regard to its application to Cenvat Credit Rules, 2002. However, any special duty may not be covered unless there is express intention to the contrary in the statute. Hon'ble the Supreme Court in the case of **Union of India v. Modi Rubber Ltd., (1986) 4 SCC 66**, has taken the view against the assessee by concluding that the special duty is not covered by the provisions of the Act. However, that view has been adversely commented upon by the later judgment of Hon'ble the Supreme Court in the case of **Collector of Central Excise, Jaipur v. J.K. Synthetics, (2000) 10 SCC 393**, on the ground that it failed to consider Section 3 of the Customs Tariff Act, 1975. Thus, we find that no question of law much less substantial question of law would arise for our determination. The claimed question is dependent on the findings as to how the refund claim made by the respondent was relatable to the additional excise duty which could not be utilized in clearance of the final products because final product was not made subject to such additional duty and that the inputs were used in the final product. Therefore, there is no merit in the appeal and the same is accordingly dismissed.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

October 12, 2007
sn/Pkapoor